IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 628

FISHER'S BLEND STATION INC., a corporation,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and THOMAS S. HEDGES and T. M. JENNER, members of said Commission,
Appellees.

APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF OF APPELLANT.

R. J. VENABLES,
DONALD G. GRAHAM,
JAMES B. HOWE,
Attorneys for Appellant,
Henry Building,
Seattle, Washington.

GODFREY GOLDMARK,
of Counsel
165 Broadway,
New York, N. Y.

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REPLY BRIEF FOR APPELLANT.

I.

Appellee has rejected the argument advanced by the State Supreme Court below to support its judgment, to wit: that Appellant is engaged in the leasing of its facilities and thus is engaged in an intrastate activity. However, in place of the theory thus repudiated, Appellee has substituted a new one, which is equally unsound.

In effect, Appellee says that Appellant is paid for permitting the advertiser to use its facilities—the microphone—and thereby himself to superimpose upon carrier waves any program he desires; that it is for this use that Appellant is paid; and that Appellant itself does not broadcast—i. e. transmits no program across state lines.

The first difficulty with Appellee's theory is that if it is sound and all Appellant does is to make a contract

for the use of its facilities, then Ch. 191, of the laws of 1933 of the State of Washington does not purport to tax that activity. Ch. 191 purports to tax certain designated activities only, one of which is radio broadcasting, and does not tax the activity of making contracts for the use of broadcasting facilities.

The second difficulty with this contention is, that it is based on assertions which have no foundation either in fact or in the record. It is a misconception to say that the advertiser by "using" or speaking into a microphone superimposes a program upon carrier waves which are continually being sent out. The functions of Appellant as a radio broadcaster are not completed merely by turning over the microphone to the advertiser, i. e., allowing him to use its facilities. Rather they first begin at that time; all subsequent acts are those of Appellant.

The opinion of this Court in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191, demonstrates this. This Court there said at p. 200:

> "As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. Thus music played at a distant broadcasting studio is not directly heard at the receiving set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the 'ether'. These radio waves are not audible. In the receiving set they are rectified; that is, converted into direct currents which actuate the loudspeaker to produce again in the air sound waves of audible frequencies. The modulation of the radio waves in the transmitting

apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus."

In a footnote to the foregoing, Mr. Justice Brandeis refers to the decision of the Supreme Court of Australia in *Chappell & Co. Ltd.* v. *Associated Radio Co. of Australia Ltd.* (1925), 50 Victoria Law Reports 350. In that case the Court in describing radio broadcasting says at p. 357:

> "With 'broadcasting' there are of course many places of audition. We may take a short statement from a recent book, 'Wireless,' by P. J. Risdon, F. R. S. A. At p. 139 he says:—'It is customary to speak of wireless transmission of speech and of converting sound waves into ether waves, and *vice versa,* but as a matter of fact we do nothing of the kind. *What we do is this: by means of sound waves we cause modulations in the flow of an electric current, which impress corresponding modulations on the aerial current, which in turn sets up a train of ether waves with modulations on them corresponding to the modulations in the original sound waves. At the receiving end the process is reversed, and sound waves are produced exactly like the original sound waves.'** At p. 144 he says that 'amplifying' a current or current variations does not mean magnifying the same current, but means that its variations are impressed upon another and more powerful current."

Similarly the activities of a radio broadcaster have been clearly described in an article by J. Warren Wright, (Radio Division, Bureau of Engineering, Navy Department) in 2 George Washington Law Review 13, 26. It is there stated:

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* Italics ours.

"For the purpose of learning the actual facts let us assume that an orchestra is playing in a broadcasting studio located in one state and the sound waves are impressed on one or more microphones, located in the studio. This causes an alternating electrical current to be generated in the pick-up equipment. It is amplified and caused to modulate the radio frequency energy produced by the broadcast transmitter. This radio frequency energy is usually produced by the conversion of commercially available electrical into radio frequency energy. The output of the transmitter is then impressed on an antenna system from which a portion is radiated in the form of electromagnetic wave energy, which may be picked up by a suitable receiving system within range of the transmission considering the sensitivity of the receiver. Under the above conditions the transmitted wave causes a radio frequency current having similar characteristics to be set up in the receiving antenna which after being impressed on the receiver is amplified at radio frequency, detected (viz: demodulated), amplified at audio frequencies and converted back into acoustical energy by a loudspeaker. In this process the receiver is assumed to be properly adjusted and energized."

From the foregoing authorities it appears that the various steps of Appellant's activities for which it is paid, in simple language may be summarized as follows:

1. Appellant (i. e. the broadcaster) converts into electrical current the sound introduced by the advertiser into one or more microphones. This current has a low frequency, moves at the same rate of speed as sound, and is known as audio frequency current.

2. Appellant regulates this current, stepping it up or down as may be required and sends it along wires to its transmitting station.

3. At the transmitting station, Appellant introduces an entirely different current along a different set of wires. This is a high frequency current, moves with the speed of light, is described as radio-frequency current and is capable of being changed into carrier waves.

4. Appellant, at its transmitting station, takes the audio-frequency waves coming along the wires from its studio* and through complex instruments superimposes them upon the radio-frequency current, thereby creating a single current which is a high frequency current distorted by the superimposed audio-frequency current. This fused current travels at the speed of light.

Technically this procedure is described as the process whereby the radio-frequency current is modulated by the audio-frequency current. As stated by Mr. Justice Brandeis in *Buck* v. *Jewell-La Salle, supra,* the process of modulation may be compared to a recording on a wax record by a recording stylus.

5. Appellant then regulates this fused current, amplifying it if necessary, and sends it along wires to its antennae and from there it is radiated out into space and for the first time travels without the aid of wires in the form of electro-magnetic or modulated carrier waves.

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* In the case of a chain broadcast, Appellant takes the audio-frequency waves coming from the wires furnished by the chain broadcaster. A chain broadcast means merely that numerous stations receive the same audio-frequency waves by different wires from a chain broadcaster and then the individual stations commence with step 3.

These electro-magnetic waves are thus transmitted by Appellant into several states and territories and the Dominion of Canada, and they are there picked up by the receiving sets of many listeners and amplified into sound. (See our main brief, pp. 9, 10, 11 and 17 to 23).

There can be no doubt, therefore, that advertisers do not pay Appellant merely for the privilege of using its microphone. *Advertisers pay Appellant to broadcast for them i. e. to transmit their programs in the form of electro-magnetic waves to the states and territories described in the record.* (See our main brief, pp. 9 to 13). Appellant's activities in so transmitting these messages constitute interstate commerce and its income from such activities are gross receipts from interstate commerce which cannot be taxed by the State of Washington. (See our main brief, pp. 23 to 25 and 35 to 41).

The absurdity of Appellee's analysis is made plain when it is applied to a telephone company operating in two states. According to Appellee's reasoning, since current is continually running through the telephone company's wires, all it does is to furnish a mouthpiece into which the telephone subscriber speaks and the activity of the telephone company is purely local. But the fact, of course, is that a telephone company does not fulfill its contract merely by furnishing a mouthpiece (comparable to a microphone) into which the subscriber speaks. Like Appellant, a telephone company performs its contract only when it converts that speech into audio-frequency current which it sends along a wire to a receiving instrument at the other end. The only difference between the functions of Appellant and those of a telephone company is that Appellant has three additional steps to perform before it fulfills its contract to broadcast a program: (a) it creates

radio-frequency current; (b) it modulates the latter by the audio-frequency current; and (c) it radiates the radio-frequency current so modulated out through the ether and across state lines in the form of electro-magnetic waves.

II.

The Cases Cited by Appellee are not Applicable.

1. Appellee's brief refers to the so-called bridge cases, *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 83; *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150. Since Appellant's brief was prepared, an article, contained in 84 University of Pennsylvania Law Review 251, has been noted in which the instant case was referred to and the following comment made:

> "The instant court (i. e. Supreme Court of Washington) using similar reasoning (the reasoning of the bridge cases) proceeded in this manner: The broadcasting company completes its business operations by making available its facilities to commercial advertisers. Thereafter, the advertiser when he broadcasts is engaged in interstate commerce; but the company having fulfilled its obligations, is not. Obviously, from a factual viewpoint the court's reasoning is faulty. In order to insure the transmission of a message it is necessary for the broadcasting company constantly to employ technicians, operators, etc., to regulate the power, volume and clarity of tone. Such a situation is hardly comparable to bridge operation where, once the bridge is constructed and made ready for use, the one crossing the bridge needs generally no aid from the operating company to get to the other side. Rather, it would seem, the proper analogy is to the telephone and telegraph cases, where for the purpose of invalidating

> state occupation taxes, the United States Supreme Court has consistently held that the corporation supplying the facilities over which the intelligence was transmitted was engaged in interstate commerce. Factually, there is a great similarity in the quality of company aid necessary for insuring the reception of telephone messages and of radio broadcasting. If the analogy is valid, it appears that the tax in the instant case was imposed on the privilege of engaging in interstate commerce, and was therefore violative of the commerce clause."

It will be noted that the statements contained in the foregoing comment entirely support Appellant's argument as contained in its main brief.

In an article contained in the January, 1936 issue of the Harvard Law Review in Vol. XLIX, page 475 (referred to by Appellee), it is stated, referring to the case at bar:

> "Thus it might be argued that the radio broadcasting station furnishes a bridge from state to state over which its clients may project electrical waves carrying potential sound. But, in effect, the ether through which the waves travel is the 'bridge'. And the broadcasting station, the motivating force behind these waves, seems in the position of the *users* of the bridge in the Henderson case, driving across that bridge packets of energy containing sounds selected by its clients."

In a footnote on the same page the writer says:

> "The Washington court analogizing the ether to a bridge, considered the broadcasting company as leasing a device which enabled the advertiser to make use of the bridge . . . but since the broadcasting company controls the technical equipment, it alone carries messages across the 'ether bridge'."

2. Appellee relies on *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, to support its contention that if a producer of electricity is subject to a state license tax, notwithstanding the fact this electricity is transmitted to other states, a radio broadcaster should also be subject to such a tax on the theory that he manufactures the electro magnetic waves.

In that case there was no tax on the gross revenue derived from the interstate transmission of the power generated. The measure of the tax was one-half mill per kilowatt hour of electrical energy produced.

The tax in the *Pfost* case was sustained upon the ground that manufacturing electricity is essentially the same in legal effect as manufacturing tangible goods. This court compared it to mining ores and held that where the incidence of the tax is upon a manufacturing process or upon manufactured products at rest in the state prior to any transmission, the tax is valid. The theory was that the function of mining or manufacturing is distinctly separable from the function of transporting the articles manufactured or mined—the manufacturing or mining process being completed before any interstate movement began. That is to say, when the manufacturing or mining process is finished the taxpayer could stop and there would be one complete process which produced a finished product, whether there was or was not a subsequent movement in interstate commerce.

That the tax in the *Pfost* case if measured by a percentage of the gross income of the interstate transmission would have been plainly invalid, is pointed out by the opinion of this Court in that case. (See 286 U. S. at page 182). If one applies this reasoning and this distinction to

the case at bar, it is readily apparent that the tax here involved is invalid. Certainly if, as this court indicated in the *Pfost* case, the proceeds resulting from the sale of the electrical energy transmitted out of the State could not be taxed, then *a fortiori* the proceeds resulting from the transmission of electro-magnetic waves across state lines cannot be taxed in the case at bar.

In addition to the difference in the nature of the tax, the facts in the *Pfost* case are entirely different from those presented by radio broadcasting. Here there is nothing manufactured which comes to rest in one State. Everything done by Appellant prior to the actual transmission of the electro-magnetic waves is a component part of the act of radio broadcasting from which Appellant derives its sole revenue. The transmission happens simultaneously with the creation of the electro-magnetic waves. Appellant cannot stop at any stage and have a finished product solely within the State of Washington. The electro-magnetic waves once created, cover an interstate and foreign area.

3. Appellee cites *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284, as sustaining an annual privilege tax based on the gross receipts of the business of producing and transporting natural gas in interstate commerce. The case did not so hold. What it did hold was that an occupation tax measured by a percentage of the value of the gas within the state is proper, but that the gross proceeds of sales of the gas in other states could not be taken as the value of such gas upon which this percentage was computed. This is clear not only from the opinion of this court but also from the opinion of the West Virginia Supreme Court whose order was affirmed on appeal. The following is quoted from the state court's opinion in 102 West Virginia 272 at 284:

> "We therefore hold under the facts in this case that the defendants (namely, the taxing officials) may not treat the gross proceeds of plaintiff's sales outside the state as the worth of its gas within the state but that they may enforce the act upon the value thereof *within the state* and *before it enters interstate commerce.*" [Italics by the Court, words in parenthesis ours.]

That the foregoing is the holding of the *Hope* case is to be seen also from the analysis made of that case by this Court in *Utah Power & Light Co.* v. *Pfost,* 286 U. S. at page 183.

The *Hope* case merely is another illustration of the type of tax which was sustained in the *Pfost* case and which is clearly different from the gross receipts tax involved in the instant case.

4. *City of Atlanta* v. *Oglethorpe University,* 178 Ga. 379, 173 S. E. 110. The Supreme Court of Georgia predicated its decision upon the absence of certain facts stipulated in the case at bar. In that case the Georgia court held that there was no evidence that the programs broadcast by the station transcended state lines or were received in other states and that it was not paid to transmit programs across state lines. The stipulated facts of the case at bar, on the other hand, demonstrate quite clearly that Appellant is paid to transmit messages in the form of electro-magnetic waves across State lines and that its messages do cross State lines (see main brief, pp. 9 to 13, 17, and 23-25); that all of Appellant's revenues are received from those "who desire to reach the listening public in areas and territory hereinabove described" (R. 7), to wit: the areas beyond the State of Washington reached by Appellant's stations (R. 5, 6).

Again, it should be noted that the segregation made in the *Oglethorpe* case of radio transmission as interstate and intrastate commerce is not the segregation made by the Appellee in this case. The Appellee here attempts to segregate Appellant's activities, not on the basis that broadcasts are confined to the State (which it could not because the State Court below has found in accordance with the stipulated facts and scientific knowledge that all broadcasts cross State lines), but on the basis that (a) the making of local contracts with sponsors whereby the sponsor is permitted and allowed access to Appellant's microphone is intrastate commerce, and (b) that non-commercial broadcasts constitute interstate commerce.

5. *Blumenstock Bros. Adv. Agency* vs. *Curtis Pub. Co.*, 252 U. S. 436.

This Court there held that contracts between an advertising agency, as broker, and a newspaper for the insertion of advertising material in a periodical did not constitute interstate commerce. It was, however, recognized in that case that the circulation and dissemination of the periodical in other states was interstate commerce. See, *Indiana Farmer's Guide Pub. Co.* vs. *Prairie Farmer Pub. Co.*, 293 U. S. 268.

How the *Blumenstock* case is at all relevant to the one at bar is difficult to see. Appellant is paid for transmitting messages, intelligence and information. In this respect it is similar to the telephone and telegraph companies which, pursuant to contract, transmit messages. If the *Blumenstock* case has any relevancy at all to the case at bar, it lies in the fact that it presents an analogy to demonstate that Appellant is engaged in interstate commerce. Certainly, if a newspaper publisher is engaged in interstate

commerce because he circulates information in the form of periodicals across State lines, then Appellant, which transmits intelligence, information and messages across State lines, is engaged in interstate commerce.

Conclusion.

The judgment of the Supreme Court of the State of Washington is erroneous and should be reversed.

Respectfully submitted,

R. J. VENABLES,
DONALD G. GRAHAM,
JAMES B. HOWE,
Attorneys for Appellant,
Henry Building,
Seattle, Washington.

GODFREY GOLDMARK,
Of Counsel,
165 Broadway,
New York, N. Y.